INDEX

Page

STATEMENT 1

ARGUMENTS:

Mere Acts of Concealment of a Conspiracy After Accomplishment of the Central Objectives, Does Not Toll the Statute of Limitations. 2

A. The Main Objective of the Conspiracy Was Obtaining Funds Fraudulently and Petitioner Took No Action Once This Was Accomplished. 3

B. The Activities of the Co-Conspirators Following Petitioner's Disappearance Were Mere Acts of Concealment. 4

C. Petitioner is Amply Protected by *Grunewald* Since He Played No Part in the Concealment. 5

CONCLUSION 7

TABLE OF AUTHORITIES:

Grunewald v. United States, 353 U.S. 391. ..2, 3, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-297

NATHAN PORTNER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF ON THE PETITION

STATEMENT

It is not Petitioner's purpose, in submitting this reply brief, to subject the Court to a reargument of the propositions already fully stated in the Petition. The function of this brief is to reiterate the need to amply protect Petitioner's statutory rights, while at the same time, to point out in the briefest manner possible certain fallacies in Respondent's argument.

ARGUMENT

MERE ACTS OF CONCEALMENT OF A CONSPIRACY AFTER ACCOMPLISHMENT OF THE CENTRAL OBJECTIVE, DOES NOT TOLL THE STATUTE OF LIMITATIONS

Although the United States, Respondent, readily admits in its Statement that Petitioner separated himself from the conspiracy in late 1959-early 1960, and remained so separated thereafter, it construes, as did the Court of Appeals, Petitioner's activities after 1960 through the 1968 F.B.I. interview as "acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy" (Brief in Opposition, p. 7, citing *Grunewald* v. *United States,* 353 U.S. 391 at 405; emphasis the Court's). In so doing Respondent seeks to so broaden *Grunewald* as to make its protection of the statute of limitation rights meaningless. As urged in the Petition, the Court should review the judgment below with a mind to either placing the instant set of facts within the applicable standards of its existing decision in *Grunewald* or to reexamine and possibly extend *Grunewald.*

Respondent admits that "Grunewald's relevant holding was that the duration of a conspiracy cannot be lengthened indefinitely for purposes of the statute of limitation merely because the conspiracy is kept secret and the conspirators take steps to bury their traces in order to avoid detection and punishment after the central criminal purposes have been accomplished" (Brief in opposition, p. 6-7, n. 4, citing, 352 U.S. at 399-406). However, Respondent joins the courts below in misconstruing the very words of the *Grunewald* holding when applying them to the instant case. Where *Grunewald* calls for continued livelihood of the time within which indictment can be had when "acts of

concealment [are] done in furtherance of the *main* criminal objectives of the conspiracy" (353 U.S. at 405), it would not leave open that time when "acts of concealment [are] done after these central objectives have been attained, for the purpose only of covering up after the crime" (supra). What more perfect set of circumstances than in the instant case for application of *Grunewald*.

A. The Main Objective of the Conspiracy Was Obtaining Funds Fraudulently and Petitioner Took No Action Once This Was Accomplished

For the purpose of argument, let the Court assume that Petitioner admits he fraudulently obtained funds from the bank, knowing full well that Tolkoff and Calabro were concealing the payments of his drafts. Further, let the Court suppose Petitioner was the only person to derive some benefit, material or otherwise, from the fraud perpetrated, and that Tolkoff and Calabro initially became implicated for the sole purpose of assisting a good bank customer through a rough financial period. Further assume Tolkoff and Calabro had absolutely no criminal intent at any point while dealing with Petitioner.

Petitioner disappeared sometime in early 1960.

Tolkoff and Calabro continued to conceal the shortages until 1968.

Petitioner had as his aim the purpose of obtaining money to tide him and his business over during a bad period. As both parties admit, Petitioner's luck ran out and he was tried, convicted and jailed on an unrelated state charge in 1961.

The "*main* criminal objectives of the conspiracy" by all rationale ended at that point. Quite frankly, it is obvious that Petitioner had no idea what his situation with the Merchants Bank was. He wrote letters while in prison to attempt to find out what his situation was. Admittedly, he stood to benefit from the activities of Tolkoff and Calabro in continuing to conceal the shortage. Inasmuch as it was not being prosecuted, *however,* the "main criminal objective" of obtaining funds had ceased. The "acts of concealment [on the part of Tolkoff and Calabro] done after these central objectives [were] attained, [were obviously] for the purpose only of covering up after the crime."

B. The Activities of the Co-Conspirators Following Petitioner's Disappearance Were Mere Acts of Concealment

The activities of Tolkoff and Calabro, after Petitioner's disappearance, were purely to protect themselves, and in line with *Grunewald,* "acts of concealment done after their central objectives have been attained, for the purpose only of covering up after the crime." To construe the activities of Tolkoff and Calabro as central to Petitioner's early activities, and to suppose, as Respondent does, that Tolkoff and Calabro really imagined that Petitioner would reappear after almost eight years to "deposit the funds to make good on [the checks]" (Brief in Opposition, pp. 7-8), is beyond the realm of human predictability.

It does not take too much imagination to envision the scenario after Petitioner disappeared: Talkoff calls Calabro reporting Petitioner's disappearance; they must protect *themselves* by continuing to cover up the shortage while looking for a way out. Petitioner would not attempt here to sketch the invective feeling

he created towards himself with Tolkoff and Calabro when he disappeared, but leaves it to the Court to imagine.

Certainly, just as the courts below, the Respondent fails to see that the acts of Tolkoff and Calabro after Petitioner's disappearance are squarely within *Gruenwald,* as they were "acts . . . for the purpose only of covering up after the crime."

As Respondent so clearly points out in its Brief, "the falsifications were charged in the indictment to be aims of the conspiracy, and the evidence showed that they were central to the scheme by which Petitioner was able to have his worthless checks honored by the use of accounting tricks." (Brief in Opposition, p. 7) Petitioner reached a point in 1959 where he cashed his last check and disappeared.

It may well be true that the falsifications were part and parcel of the active conspiracy and made the honoring of the worthless checks possible during the period of Petitioner's activities; however, when his activities ceased, the falsifications had nothing to do with assisting Petitioner cash checks.

C. Petitioner Is Amply Protected by Grunewald Since He Played No Part in the Concealment

Respondent contends that "the acts of concealment—the falsifications of the bank's books—were manifestly done in furtherance of the *main* criminal objectives of the conspiracy" (Respondent's Brief at p. 7). As previously discussed, Petitioner takes pointed issue with this. The bare facts show that Petitioner had absolutely no knowledge of what Tolkoff and Calabro were doing from the time he went to jail on the unrelated state charge. He assisted them in

no manner in their efforts to conceal the misuse of funds by falsifying the bank's records. As discussed, these activities were mere concealment, as the *main* objective was complete with the last receipt of funds.

The Government appears to want Petitioner to "carry a sign" disavowing the conspiracy. What value is a statute of limitations? Petitioner committed a crime, he fraudulently obtained funds in 1959. For him to receive the benefits of the statute of limitations, Respondent would have him publicly admit the crime in order that the statute might begin to run. Petitioner waved a red flag in front of the Merchants Bank and the New York State Banking Department when he wrote the letters while in jail. Respondent's narrow view of affirmative action is unrealistic. The *main* objective was finished.

Assuming, arguendo, that Petitioner's activity in denying to the F.B.I. in 1968, that he ever had any banking connections with Merchants Bank, is concealment; it certainly is the type of concealment "for the purpose only of covering up after the crime," which *Grunewald* stands for.

"*Grunewald's* relevant holding was that the duration of a conspiracy cannot be lengthened indefinitely for purposes of the statute of limitation merely because the conspiracy is kept secret and the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purposes have been accomplished" (Brief in Opposition, pp. 6-7, n.4, citing, 353 U.S. at 399-406). The Respondent has misconstrued this holding and Petitioner has come before the Court to question whether the very purpose of the statute of limitations (18 U.S.C. 3282) is not

defeated and nullified by the interpretation given by the courts below, and Respondent, and applied to this case concerning the conspiracy statute (18 U.S.C. 371) (Petition, p. 4, Questions 12).

CONCLUSION

For the reasons stated and arguments presented herein, and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

HOWARD FRANKLIN CERNY
Attorney for Petitioner
345 Park Avenue
New York, New York 10022
(212 688-9700

HOWARD F. CERNY
JOHN J. MEGLIO
RICHARD SILVER
Of Counsel

October 19, 1972